LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
Aug 19 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., as Secretary of State, State of Georgia, JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia, ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia, and JIM W DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

MOTION TO AFFIRM

and

BRIEF OF APPELLEES IN SUPPORT OF MOTION

FRANCIS SHACKELFORD,
An Attorney for Appellees and Representative of the Other Attorneys for Appellees, viz.:

EDWARD S. WHITE,
ISRAEL KATZ,
EMMET J. BONDURANT, II,
HAMILTON LOKEY,
WILLIAM B. GUNTER,
A. R. KENYON,
JOSEPH B. CUMMING,
J. QUENTIN DAVIDSON
JOHN E. SIMPSON,
RAYMOND M. REED,
JOHN W. SOGNIER,
ALBERT P. REICHERT,
Attorneys for Appellees.

1220 Citizens & Southern National Bank Building,
Atlanta, Ga. 30303.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street CEntral 1-4477

TABLE OF CONTENTS

	Page
Motion to Affirm	1
Statement of Facts	2
Questions Presented	4
Argument	5
I. Lower Court Acted on General Equitable Principles	5
(a) District Court Balanced the Equities	6
(b) Injunction Necessary to Prevent Irreparable Damage	8
(c) Attacks Made by Appellants Not Valid	11
II. Lower Court Properly Acted on State Law Question	14
III. Restrictions on Authority of Legislature Can Readily Be Eliminated	19
Conclusion	20

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) 7, 11

Bell v. Maryland, ... U. S. ..., 84 S. Ct. 1814 (1964) 19

Brown v. Board of Education, 349 U. S. at 299-300, 75 S. Ct. at 756 7

Carton v. Secretary of State, 151 Mich. 337, 115 N. W. 429, 430 (1908) 18

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U. S. at 271, 54 S. Ct. at 157 (1933) 8

Clayton v. Calhoun, 76 Ga. 270, (1885) 9

Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, 10 (1912) 18

Gaskins v. Dorsey, 150 Ga. 638, 104 S. E. 433 (1920) 9

Gray v. Sanders, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963) 3

Harrison v. N. A. A. C. P., 360 U. S. 167, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959) 18
Hurn v. Oursler, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933) 18
Jones v. Montague, 194 U. S. at 153 (1904) 13
Livermore v. Waite, 102 Cal. 113, 36 Pac. 424 (1894) 9, 17
Lucas v. Forty-Fourth General Assembly of Colorado, ... U. S. ..., 84 S Ct. 1472, at 1486 (1964) 10, 19
McFadden v. Jordan, 32 Cal. 2d 330, 196 P. 2d 787, 796 (1948) 9, 17
McNeese v. Board of Education, 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963) 18
Reynolds v. Sims, ... U. S. ..., 84 S. Ct. 1362 (1964) 2, 5, 7, 8, 9, 10, 11, 12, 19, 20
Swanson v. Illinois, 226 F. Supp. 699 (D. C. Ill. 1964) 19
Thigpen v. Myers, 33 U. S. Law Week 2060 (U. S. D. C. W. D. Wash. July 23, 1964) 19
Tolbert v. Long, 134 Ga. 292, 294, 67 S. E. 826 (1910) 9
Toombs v. Fortson, 205 F. Supp. 248 (N. D. Ga. 1962) ..... 2, 3, 6.
Wheeler v. Trustees of Fargo Consolidated School District, 200 Ga. 323, 37 S. E. 2d 322 (1946) 12, 14, 15, 16, 17, 21

Statutes

Constitution of Georgia, 1945:
Art. XIII, Sec. I, Para. I 7, 11, 14
Art. XIII, Sec. I, Para. II 11, 15
Ga. Code Ann.:
§ 2-501 15
§ 2-8101 ..... 4, 14
§ 2-8102 ..... 11, 15

Textbook

19 Am. Jur. 51, § 22 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

BEN W. FORTSON, JR., as Secretary of State, State of Georgia, JAMES F. WHITE, Ordinary of Fayette County, Georgia, A. B. TOLLISON, Ordinary of Forsyth County, Georgia, ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia, and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,

vs.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

MOTION OF APPELLEES TO AFFIRM.

Under the authority of Rule 16 of this Court appellees move to affirm the order and decree of the three-judge federal district court sought to be reviewed on this appeal on the ground that it is manifest that the questions on which the decision depends are so unsubstantial as not to need further argument.

BRIEF OF APPELLEES IN SUPPORT OF MOTION.

STATEMENT OF FACTS.

This action was brought in 1962 by appellees, residents of the two most populous counties in Georgia, for themselves and others similarly situated, seeking reapportionment of both houses of the Georgia legislature. The district court, in **Toombs v. Fortson**, 205 F. Supp. 248 (N. D. Ga. 1962), found the disparities existing in both houses to be so extreme as to amount to invidious discrimination against the class represented by appellees. It ordered the prompt reapportionment of one house and held that it was not necessary at that time to make a final determination whether the other house could remain completely unrelated to population ratios. The court retained jurisdiction for the entry of such further orders as might be required. In compliance with the order the Georgia Senate was reapportioned in October, 1962.

On June 17, 1964, two days after the decision of this Court in **Reynolds v. Sims**, ... U. S. ...., 84 S. Ct. 1362 (1964), and its companion cases, appellees moved in the district court to compel reapportionment of the House of Representatives of the Georgia General Assembly prior to the November 1964 general election. Under the existing apportionment representatives from the 103 least populous counties of the State, constituting a constitutional majority of the 205 members of the House of Representatives, represent counties having approximately 22-1/2% of the population of Georgia. A voter in Echols County has 100 times the effective representation in the House of Representatives of those who reside in Fulton County which, with over 14% of the State's total population, is represented by only 3 of the 205 members of the

House. The inequalities in the apportionment of the house are more fully described in the district court's initial opinion in **Toombs v. Fortson**, *supra*, and are identical with the disparities existing under the Georgia county-unit system which was struck down by this Court in **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

At the hearing in the district court, appellants made no attempt to defend the constitutionality of the system under which the House of Representatives has been apportioned for more than 96 years.[1] Appellants asked only that reapportionment be delayed until after the election of a new General Assembly in November 1964 for regular two-year terms.

At the time of the hearing in the district court the Georgia General Assembly was convened in extraordinary session to prepare a new constitution in the form of a single "amendment" to the existing constitution for submission to the people for ratification at the November 1964 general election.

Following hearings on June 19 and 24, 1964, the district court entered an order in which it permitted a new General Assembly to be elected at the general election in November 1964 and permitted reapportionment be deferred until 1965. During the interim, however, appellants, who are state election officials, were enjoined from placing the question whether an entirely new constitution should be adopted in the form of an amendment to the present constitution on the ballot in any election pending reapportionment of the General Assembly. The

[1] In their jurisdictional statement, page 5, appellants concede that the question of apportionment standards under the Fourteenth Amendment is not in issue here, and they expressly do not appeal from so much of the decree of the district court as requires that the House be reapportioned on a population basis.

injunction expressly authorized the submission to the electorate of individual constitutional amendments, separate as to subject matter, in accordance with Article XIII, Section 1, Paragraph 1 (Ga. Code Section 2-8101) of the Georgia Constitution. The order also permitted the calling of a constitutional convention of delegates elected by the people on the basis of population, as provided by the Georgia Constitution.

QUESTIONS PRESENTED.

I. Whether the district court failed to act in accordance with general equitable principles in enjoining appellants from submitting to the electorate an entirely new state constitution proposed by the grossly malapportioned Georgia legislature during the interim prior to reapportionment.

II. Whether the district court correctly held, as a matter of state law that the Georgia legislature has no authority to propose to the electorate an entirely new state constitution.

III. Whether it is manifest that the foregoing questions, on which the decision of the district court depends, are so unsubstantial as not to need further argument.

ARGUMENT.

I.

In deferring the immediate relief that it could have granted to appellees, the district court took local conditions into account as contemplated by this Court in Reynolds v. Sims, infra, and acted and relied on general equitable principles in enjoining the submission of an entirely new constitution to the voters in the form of an amendment pending reapportionment.

Under the rationale of **Reynolds v. Sims**, ... U. S. ..., 84 S. Ct. 1362 (1964), an order requiring immediate reapportionment of the second house of the General Assembly would have been clearly appropriate. There this Court emphasized that "once a state's legislative apportionment scheme has been found to be unconstitutional it would be the **unusual** case in which a court would be justified in not taking appropriate action to insure that **no further elections are conducted under the invalid plan.**" (Emphasis supplied.) Although this Court recognized that relief might be withheld under certain circumstances it expressly held in that case that the district court acted with proper judicial restraint when, on July 21, 1962 (a month later than in the present case), it ordered immediate reapportionment of the Alabama legislature "at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty," notwithstanding that all candidates had been nominated in party primaries held in May.

Although only a part of the candidates for election to the Georgia House of Representatives had been nominated in Democratic party primaries[1] held prior to the date of

[1] No Republican candidates for election to the House of Representatives had been nominated

the hearings below, the district court, in deference to appellants' request for more time, declined to require that the House be reapportioned prior to the November 1964 general election.[2]

(a) The District Court Balanced the Equities.

After weighing the competing equities the district court concluded in its order of June 19, 1964, "that adequate protection of the rights of plaintiffs and their class can be afforded without so greatly interfering with the normal election procedures in this election year." It considered that under the mandate of this Court in **Reynolds**, *supra*, a court of equity could not "stand aside" and permit the "improperly constituted legislative body" to submit to the voters an entirely new constitution that could subsequently be changed only by amendment proposed by "a two-third vote of the two houses of a properly apportioned General Assembly."[3]

Appellants argued to the district court that an injunction against submission of the proposed constitution to the electorate would deprive the State of power to deal with important problems of urban renewal, rapid transit and other urgent matters. In response, the district court, as an "accommodation between the relief which would permit the Legislature to reapportion itself and yet which

---

[2] Previously, in *Toombs v. Fortson*, 205 F. Supp. 248 (N. D. Ga. 1962), the district court, in September 1962, required reapportionment of the Georgia Senate prior to the November 1962 general election.

[3] Appellants' assertion at page 10 of their jurisdictional statement that appellees did not desire injunctive relief is patently in error. A specific prayer to enjoin the malapportioned General Assembly from proposing a new constitution to the electorate was not included in the original complaint, because no proposed constitution was then pending. When it was observed at the hearing on June 19, 1964 that such injunctive relief was beyond the scope of the complaint, appellees promptly filed an amendment specifically requesting such relief.

would leave to such reapportioned Legislature the performance of its legislative duty looking toward the adoption of a new constitution,"[4] expressly provided that "nothing in this order shall prevent the submission [to the people] of amendments which are separate as to subject matter, in accordance with Article XIII, Section I, Paragraph I, of the Constitution of the State of Georgia, 1945."[5]

As this Court emphasized in **Reynolds v. Sims**, *supra*:

> "Remedial technique in this new and developing area of the law will probably differ with the circumstances of the challenged apportionment and a variety of local conditions."

To guide the district courts in moulding their decrees this Court quoted from the concurring opinion of Mr. Justice Douglas in **Baker v. Carr** that "any relief accorded can be fashioned in the light of well-known principles of equity."[6]

This Court's directions to the district courts in the present area are remarkably similar to those in the school cases. There, the Court said:[7]

> "Full implementation of these constitutional principles may require solution of varied local school problems . . . In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public

---

[4] Appendix "A", page 27, of appellants' jurisdictional statement.

[5] Appendix "B", page 30, and Appendix "C", page 32, of appellants' jurisdictional statement.

[6] 369 U. S., at 250, 82 S. Ct., at 727.

[7] *Brown v. Board of Education*, 349 U. S., at 299-300, 75 S. Ct., at 756.

and private needs. These cases call for the exercise of these traditional attributes of equity power."

In the present case the district court, having rejected the prayer of the appellees for immediate relief, followed the mandate of this Court to act and rely on general equitable principles and provided an "accommodation" to safeguard the interests of appellees and their class during the continued suspension of their constitutional rights while the decree is being carried out. In so doing the Court applied the undoubted power of a court of equity to "prescribe the performance of conditions designed to protect the rights of the parties pending appeal . . . or to protect temporarily the public interest while its decree is being carried into effect." **Central Kentucky Natural Gas Co. v. Railroad Commission**, 290 U. S. at 271, 54 S. Ct. at 157 (1933). See 19 Am. Jur. 51, § 22.

It is an underlying assumption of appellants in their jurisdictional statement that when the district court has ordered reapportionment by a date fixed in accordance with **Reynolds** it has exhausted its equity power and can take no further action in formulating its decree to protect the rights of the parties or the public interest from irreparable injury during the interim. We submit that any such assumption is contrary to both the letter and spirit of the **Reynolds** decision. The traditional flexibility and capacity of a court of equity are not so restricted, particularly when vindication of the admitted constitutional rights of a majority of the citizens of the State must continue to be postponed.

(b) Injunction Necessary to Prevent Irreparable Damage.

The issuance of the injunction was clearly necessary to prevent irreparable injury to the plaintiffs and their class until reapportionment of the House of Representatives is accomplished. Similar relief was granted by

the district court in the **Reynolds** case. As this Court observed, the district court prevented the proposed 67-senator amendment from being placed on the ballot for ratification at the general election by invalidating it prospectively. See Footnote 48 to **Reynolds**, 84 S. Ct. at 1386.[8]

It cannot be seriously disputed that by far the most important stage in the adoption of a new constitution is that of drafting the basic principles to be included within its provisions. After adoption of a constitution by the legislature, the people can only accept or reject it in its entirety—they are without power to rewrite the document submitted to them, no matter how odious individual provisions may be. On precisely these facts the Supreme Court of California said in **McFadden v. Jordan**, 32 Cal. 2d 330, 196 P. 2d 787, 796 (1948):

> "The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from the electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accept

[8] See also *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424 (1894) and *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P. 2d 787 (1948), where the Supreme Court of California enjoined the State's election officials from submitting a new constitution to the voters.

Although the cases of *Clayton v. Calhoun*, 76 Ga. 270 (1885) and *Gaskins v. Dorsey*, 150 Ga. 638, 104 S. E. 433 (1920), cited by the appellants at page 13 of their jurisdictional statement declare a rule of general application, as the Supreme Court of Georgia said in *Tolbert v. Long*, 134 Ga. 202, 204, 67 S. E. 826 (1910), "an exception has been recognized to the general principle, where the constitutional rights of a citizen and a taxpayer are sought to be evaded by an attempt to make an unconstitutional or inapplicable law operative through the means of popular election. (Citations omitted)."

> ing the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article."

To be unfairly excluded from this initial stage in the formulation of a new constitution is to be cut off from the very well-springs of government. At this point in the political process, more than at any other, to the extent that an individual is inadequately represented "he is that much less a citizen." See **Reynolds v. Sims**, 84 S. Ct., at 1384.

It is no answer that the constitution which has been proposed by a malapportioned General Assembly will be submitted in its entirety for ratification by the people at the general election. As this Court emphasized in **Lucas**, "an individual's constitutionally protected right [to full and effective participation in the political processes of the State's legislative bodies and] to cast an equally weighted vote may not be denied even by a vote of a majority of a State's electorate. . . ." **Lucas v. Forty-Fourth General Assembly of Colorado**, . . U. S. . , 84 S. Ct. 1472, at 1486 (1964). As the district court observed in the present case, a constitutional provision adopted by an invalidly apportioned legislature, unlike an ordinary statute, cannot be changed after reapportionment by a simple majority. The fact that the proposed constitution can be amended only by a two thirds vote of both Houses effectively locks the provisions into the document.

Appellants have chosen to ignore in their argument the fact that the district court was careful to leave open the power to propose and adopt constitutional amendments or even an entirely new constitution by means

less likely to result in irreparable injury to the right of the plaintiffs to participate in the political processes of republican government. The appellants were expressly authorized to place individual amendments on the ballot, separated as to subject matter as required by the Georgia Constitution (Article XIII, Section I, Paragraph I, Ga. Code Sec. 2-8101), for acceptance or rejection by the people on an individual basis. The order further stated that it should not prevent the General Assembly from calling a "convention of the people to revise, amend or change the constitution" in which convention, representation is "based on population as nearly as practicable" in accord with Article XIII, Section I, Paragraph II, of the Georgia Constitution (Ga. Code Sec. 2-8102). The state has full power to amend the present constitution in any respect which it may deem necessary or appropriate. The only restriction imposed by the order of the district court is to require that it do so in a manner which is not unduly destructive of the rights of the class represented by appellees during the interim period prior to the time that they are fully and adequately represented in both houses of the General Assembly.

(c) **Attacks Made by Appellants Are Not Valid.**

Much of the argument in Division (a), page 11, of their jurisdictional statement is misplaced in the context of the present case.

Their contention that the order of the district court subverts the democratic process has been resolved to the contrary by **Baker v. Carr**, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); and **Reynolds v. Sims**, *supra*.

Their logic in asserting that since a legislature, although unconstitutionally malapportioned, retains the power to enact valid legislation, a court is without power to enjoin law-making process is, we submit, neither sound

nor relevant to the solution of the unique and difficult problem facing the district court in this case.

This Court has just announced that "it would be the unusual case" in which further elections would be permitted under the invalid plan. The existing apportionment involved discrimination as great as 100 to 1 against appellees, as shown above. The constitutional rights of the citizens of the more populous counties have long been denied. The court had the clear power to order immediate reapportionment. On the other hand, the governor of Georgia had personally appeared, *amicus curiae*, to urge that reapportionment be postponed until after the election of a new General Assembly for a two-year term. The "moment of legislation" had passed by the time of the hearing on June 24th. Conscious of local conditions as contemplated in **Reynolds**, the district court took this Court at its word and fashioned a decree that took into account, on one hand, the continued suspension of the admitted rights of the appellees and, on the other, the alleged need of the State for more time to reapportion.

If the district court had doubted its power to balance the equities by restraining the adoption of an entirely new constitution until reapportionment could be accomplished, it might well have ordered reapportionment by late summer or early autumn, 1964, as it had done in 1962 and as the district court in Alabama had done in **Reynolds**.

The activity of the General Assembly in preparing a new constitution cannot be considered as "legislation", as is demonstrated in **Wheeler v. Trustees of Fargo Consolidated School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946), *infra*, in Division II of this brief.[9]

[9] The Supreme Court of Georgia held in *Wheeler*, 200 Ga., at 332, 37 S. E. 2d, at 328, that in drafting a new constitution to be

Appellants assert that unless the district court's injunction is stayed, the case will become moot after the middle of September. Although the order would have the effect of postponing a vote on the proposed constitution in November 1964, nothing will prevent its submission for ratification at a subsequent election after reapportionment has been accomplished. In contrast, however, should the decision of the lower court be reversed and the constitution placed on the ballot and ratified prior to the reapportionment of the House of Representatives, its provisions would be locked in as long as the rural minority can defeat a two-thirds vote to amend. As this Court said in **Jones v. Montague**, 194 U. S., at 153 (1904): "The thing sought to be prohibited has been done and cannot be undone by any order of the Court." Thus, should the injunction ordered below be eliminated, appellees will be completely without recourse.

Since appellants admit that the apportionment of the Georgia House of Representatives is unconstitutional, the only objective of their motion and jurisdictional statement is to stay the injunctive relief granted by the district court to protect the interest of appellees and their class until reapportionment is carried out by January, 1966. If the injunction were dissolved, not only would the delicate balance of equities be destroyed but there would be other unfortunate side effects that the district court, being close to the situation, can more readily foresee and evaluate than this Court. For example, since the district court enjoined its submission in November 1964, there has been little or no public interest in or discussion of the proposed constitution. If the injunction

---

submitted to the people in the form of an amendment to the existing Constitution, the Georgia legislature had no more authority than "an assemblage of private citizens." The validity of the new constitution, after being adopted, stemmed not from the "framing or submission of the instrument" but from the "fiat" of the people

were dissolved in September, as urged by appellants, there would not remain sufficient time for the public to study and debate its detailed and complex provisions. Thus the injunction, intended by the district court as an instrument to protect the interest of appellees and mitigate the continued postponement of their Fourteenth Amendments rights, might, if lifted at a date near the general election, be the proximate cause of the adoption of the constitution which, if adequate time had been provided for study and debate, would have been rejected by the voters.

II.

The district court correctly held, as a matter of state law within its ancillary jurisdiction, that the Georgia legislature has no authority to propose to the electorate an entirely new state constitution in the form of an amendment to the present Constitution.

In their jurisdictional statement appellants contend that the order of the district court with respect to the authority of the General Assembly to propose a new constitution is contrary to the decision of the Supreme Court of Georgia in **Wheeler v. Board of Trustees of Fargo School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946). The district court did not so construe its order. See pages 26-27, Appendix "A" to appellants' jurisdictional statement. A reading of **Wheeler** will demonstrate the correctness of the district court's analysis of that decision.

Although the present Georgia Constitution confers on the legislature the power to propose **amendments**, the legislature has no power to propose a **new** or **revised** constitution (Article XIII, Section I, Paragraph I, Ga. Code, Sec. 2-8101). The people have reserved to themselves the

power to "revise" the Constitution by constitutional convention (Article XIII, Section I, Paragraph II, Ga. Code, Sec. 2-501 and 2-8102). The legislature may propose changes in the constitution only when such changes constitute amendments as distinguished from a revision of the entire instrument. The same was true under the Constitution of 1877. The legislature in proposing the Constitution of 1945 recognized that limitation and sought to avoid it by offering the new constitution in the guise of an amendment.[10] That device was clearly recognized by the Supreme Court of Georgia in **Wheeler** where it said:[11]

> "We conclude that the instrument . . . is not an amendment to the Constitution of 1877; but on the contrary it is a completely revised or new Constitution."

In **Wheeler** the Court compared the role of the Georgia legislature to that of the convention that drafted the Constitution of the United States and quoted Pomeroy's **Constitutional Law** as follows:[12]

> "'. . . . but they [the members of the convention] knew that their labors were only to be suggestions; and that they as well as any private individuals, and

[10] In the present situation the General Assembly and Governor undertook the "amendment" to the Georgia Constitution with full knowledge of their probable lack of authority to do so. As shown on page 16 to appellants' jurisdictional statement, the Attorney General of Georgia rendered an opinion in favor of the doubtful procedures only after a citizen of Cedartown, Georgia, had taken the position in a letter to the Governor that the General Assembly had no power to submit for ratification a completely new constitution and that the sole method of so doing was by convention. A legal memorandum discussing the *Wheeler* case in detail accompanied that letter. The opinion of May 28, 1964 from the Attorney General, who represents the appellants in the present case, is merely an argument, not binding on either the appellees or this Court.

[11] See 200 Ga., at 330, 37 S. E. 2d, at 327.

[12] See 200 Ga., at 332, 37 S. E. 2d, at 328.

any private individuals as well as they, had a right to propose a plan of government to the people for their adoption. They were, in fact, a mere assemblage of private citizens, and their work had no more binding sanction than a constitution drafted by Mr. Hamilton, in his office, would have had."

With reference to the Constitutional Convention of 1787 the Supreme Court of Georgia also said, in **Wheeler**, that:[13]

> "It [the convention] had no more express authority to frame and submit to the people a new constitution than did the Georgia Legislature, or the committee provided for by the resolution [the so-called Revision Commission]. . . . That convention simply recognized the right of the people, the sovereign, to adopt a new constitution framed by any one. . . ."

The draft instrument which became the Constitution of 1945 achieved validity only because the people gave it life by ratification in an election. By the time the matter reached the Supreme Court of Georgia it was faced with the question of whether a **constitution** was valid rather than when a **legislative proposal** was valid. In **Wheeler** the court had before it the question not whether the legislature had exceeded its power but whether the people had exceeded their power. In recognizing that distinction the court said:[14]

> ". . . restricting by implication the legislative or any other branch of our government, created by the Constitution; is one thing; and restricting by implication the sovereign right and power of the people is another and altogether different thing."

The court in **Wheeler** simply held that the people had retained to themselves the right to revise their constitu-

[13] See 200 Ga., at 332, 37 S. E. 2d, at 328.

[14] See 200 Ga., at 334, 37 S. E. 2d, at 329.

tion and that since they had ratified the proposed revision by majority vote the new constitution would be treated as valid. The court did not say or imply that the legislature had the power to propose a new constitution but only that the people in the exercise of their sovereignty could adopt a new constitution by direct vote and were not limited under the Constitution of 1877 to acting through a constitutional convention.

It appears then that only a suit brought prior to the time a new constitution is voted on by the people could raise one of the important questions before the District Court in the present case, namely, whether the Georgia General Assembly (malapportioned with disparities as great as 100 to 1) may validly propose a new constitution. Applying its analysis of the reasoning of the Supreme Court of Georgia in **Wheeler** the district court held that the Georgia legislature has no such power.

The district court's decision in the present case is not only in accord with **Wheeler** but is consistent with other authority on similar facts. See, for example, **Livermore v. Waite**, 102 Cal. 113, 36 Pac. 424, 426 (1894), a suit by a taxpayer and citizen to enjoin the Secretary of State of California from submitting to the electors a proposed constitutional "amendment" which was in fact a revision of the constitution. There, the court in affirming the injunction issued by the lower court said:

> "The Legislature is not authorized to assume the function of a constitutional convention and propose for adoption by the people a revision of the entire constitution under the form of an amendment."

In **McFadden v. Jordan**, 32 Cal. 2d 330, 196 Pac. 2d 787 (1948), in which the legislature of California proposed an "amendment" to the California Constitution, suit was brought to prohibit the proposed change from being placed

on the ballot. The court granted the injunction, holding that the proposed change was a "revision" rather than an "amendment" and hence could not be proposed or initiated by the legislature. See also **Carton v. Secretary of State**, 151 Mich. 337, 115 N. W. 429, 430 (1908), and **Ellingham v. Dye**, 178 Ind. 336, 99 N. E. 1, 10 (1912).

If the decision of the district court was not in fact contrary to **Wheeler**, as contended by appellants, they do not question the ancillary jurisdiction of the district court to predicate its injunction in the present case on the absence of authority in the General Assembly to submit a revised constitution to the people in the form of an amendment.[13]

Appellants argue, at page 18 of their jurisdictional statement, that the district court erred in undertaking to resolve a question of state law and in the present circumstances should have abstained. This case, however, arises under the Civil Rights Acts, and abstention would have been clearly inappropriate. See **McNeese v. Board of Education**, 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963).

For many reasons the decisions on equitable abstention cited by appellants are not in point in the present case. First, the question whether the Georgia legislature has authority to propose a new constitution to the people in the form of an amendment to the existing Constitution involves no federal constitutional issue as did all of the decisions cited on this point by appellants. Second, no case raising that issue was then pending or is now pending in the state courts, and there would not have been sufficient time before the November general election to bring a new action and obtain a decision from the Supreme Court of Georgia. Third, in **Harrison v. N. A. A.**

[13] *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933).

C. P., 360 U. S. 167, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959), and **Bell v. Maryland**, ... U. S. ..., 84 S. Ct. 1814 (1964), relied on by appellants, the action taken by this Court had the effect of carefully safeguarding the rights of the affected parties during the period required to obtain a state court adjudication. Fourth, in both **Lucas v. The Forty-Fourth General Assembly of Colorado**, ... U. S. ..., 84 S. Ct. 1472 (1964), and **Swanson v. Illinois**, 226 F. Supp. 699 (D. C. Ill. 1964), there were cases pending in the state court at the time the federal court abstained and, moreover, there is nothing in either of those decisions to indicate that abstention was mandatory.

The whole thrust of **Reynolds v. Sims**, *supra*, under the authority of which the district court framed its order, required the district court to exercise its discretion to apply general equitable principles, and in such circumstances that court could not properly have abstained from deciding the state law question.

III.

The complaint of appellants that the order improperly limits the authority of the 1965 General Assembly is no more than an afterthought and in any event can readily be eliminated by proper application to the district court.

Although appellees do not construe the district court's order at limiting the authority of the 1965 General Assembly, as contended by appellants at pages 18 et ff. of their jurisdictional statement, it was within the authority of the district court to impose such limitations if it had seen fit to do so. See **Thigpen v. Myers**, 33 U. S. Law Week 2060 (USDC W. D. Wash. July 23, 1964) in which the three-judge district court, in giving the Washington legislature the choice of weighted voting or reapportioning itself, said:

> "To the end that redistricting, a political act, may be accomplished in this State by the body primarily constitutionally charged with such responsibility, and to avoid any taint of unconstitutionality, we sanction a special session of the legislature for the sole and limited purpose of enacting redistricting legislation on a constitutional basis, together with the enactment of such legislation as may be necessary to sustain such special session and to carry the plan adopted through the elective process."

In its show cause order of June 19, 1964 the district court invited appellants to advise the court of the effect that the proposed order would have on the functioning of the state government. Appellants made no mention of such alleged restrictions at any time prior to entry of the final revised order of June 30, 1964 and has not applied to the district court for clarification or modification. If appellants should see fit to apply to the district court for modification of the order to eliminate such limitations on the authority of the 1965 General Assembly, appellees will offer no objection to such modification as is necessary to eliminate the restrictions as to which appellants complain in that portion of their jurisdictional statement.

CONCLUSION.

Since the district court, in withholding immediate relief to the appellees in this "unusual case," provided a practical "accommodation" that would not prevent the continued adoption of constitutional amendments on specific matters of importance to the state, it is apparent that the present injunctive order applied general equitable principles adapted to local conditions and carried out both the spirit and letter of this Court's directions in **Reynolds v. Sims.**[18]

---

[18] 84 S. Ct., at 1393-4.

It is also apparent that the question of state law decided by the district court in holding that the Georgia General Assembly has no authority to propose to the electorate a new constitution in the form of an amendment was not decided to the contrary by the Supreme Court of Georgia in **Wheeler v. Trustees.**[17]

It therefore appears that the injunctive relief granted by the district court could have been solidly based on either of the foregoing independent grounds and that the charges of appellants that the order places the State of Georgia in a trusteeship are rhetorical rather than realistic.

Nothing has transpired since entry of the final revised order by the district court on June 30, 1964, to change the situation, and appellees respectfully submit that the questions on which the decision under review depends are so unsubstantial as not to need further argument.

Appellees pray, therefore, that the decision below be affirmed.

FRANCIS SHACKELFORD,
An Attorney for Appellees and Representative of the Other Attorneys for Appellees, viz.:

EDWARD S. WHITE,
ISRAEL KATZ,
EMMET J. BONDURANT, II,
HAMILTON LOKEY,
WILLIAM B. GUNTER,
A. R. KENYON,
JOSEPH B. CUMMING,
J. QUENTIN DAVIDSON,
JOHN E. SIMPSON,
RAYMOND M. REED,
JOHN W. SOGNIER,
ALBERT P. REICHERT,

Attorneys for Appellees

1220 Citizens & Southern National Bank Building,
Atlanta, Ga. 30303.

---

[17] 200 Ga. 323, 37 S. E. 2d 322 (1946).